

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

4 UNITED STATES OF AMERICA)
5)
6 vs.) No. 1:16-cr-10134-DPW
7 DAVID TKHILAISHVILI AND)
8 JAMBULAT TKHILAISHVILI,)
Defendants.

Defendants.

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

PRETRIAL CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Wednesday, April 26, 2017
11:10 a.m.

21 Brenda K. Hancock, RMR, CRR
22 Official Court Reporter
23 John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210
(617) 439-3214

1 APPEARANCES:

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5 On behalf of The United State of America.

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On behalf of the Defendant.

10
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7 THE CLERK: All rise.

8 (The Honorable Court entered the courtroom at 11:10 a.m.)

9 THE CLERK: This Honorable Court is now in session.
10 You may be seated. Criminal Action Number 16-10134, United
11 States v. Tkhlalaishvili.

12 THE COURT: Well, you may be seated. I think the
13 place where I would like to start is what I will call the
14 question of or my concern about being lost in translation. I
15 see the references to not stipulating to transcripts, and I
16 want to understand what you think is going to be happening. Is
17 it anything other than saying, "We don't stipulate," or does it
18 involve alternative transcripts? Do we have a Rengifo (ph)
19 issue here? What's going on?

20 MR. CRUZ: As far as the transcripts are concerned,
21 your Honor, we had discussions about whether or not we were
22 going to agree that those should be entered as exhibits in this
23 case.

24 THE COURT: Put that to one side. The transcripts get
25 presented. I understand that there is not a stipulation, but

1 are you telling me now that there is a stipulation with respect
2 to the accuracy of the transcripts?

3 MR. CRUZ: I don't have a dispute with regard to the
4 accuracy of the transcripts. What I raised in a motion that I
5 asked leave to file with the Court late was redaction of
6 portions of, I believe, one of the transcripts. One of
7 these --

8 THE COURT: Well, I want to understand from
9 Mr. Tumposky if there is a dispute about the accuracy of the
10 transcripts. That right now is what I am considering.

11 MR. TUMPOSKY: I don't have a dispute on behalf of my
12 client, no.

13 THE COURT: All right. So, I'm sorry to interrupt
14 you, but I just wanted to get that clarified.

15 MR. CRUZ: Yes, your Honor. So, the only issue I have
16 with the transcripts is that there are two specific sections
17 that I have highlighted that I think the Court should strongly
18 consider ordering redacted. One of these sections has to do
19 with a reference to my client, David Tkhilaishvili, being
20 arrested in the past, and as I laid out in the motion filed
21 with the Court --

22 THE COURT: But why isn't that relevant to his
23 interaction with the cooperating individual, that is, to his
24 understanding of what it was that the object of his concerns or
25 the concerns of Count One and Count Two are being reflected in

1 this conversation?

2 MR. CRUZ: Well, your Honor, what we're talking about
3 here is the defendants' intent in terms of the attempted
4 extortion.

5 THE COURT: Right.

6 MR. CRUZ: The other issue that the Court obviously
7 has to consider is the state of mind of the victim, quote,
8 unquote, in the case.

9 THE COURT: Right.

10 MR. CRUZ: What I'm suggesting to the Court is that
11 under the circumstances presented in this transcript, where the
12 alleged victim in the case is prompting a discussion about a
13 particular issue that leads to my client stating that he had
14 been arrested in the past, the portion of the transcript that
15 has to do with the arrest itself, that goes to the defendant's
16 intent to cause or induce fear in the victim. And what I'm
17 suggesting to the Court is that under those circumstances,
18 where the victim in the case is prompting the conversation to
19 begin with, that that doesn't speak to the defendants' intent.

20 THE COURT: It may. It is part of the gestalt of the
21 conversation. That it was elicited from the defendant,
22 according to your characterization, does not mean that the
23 defendant is not or could not be held to be comfortable with
24 the idea that the object of the extortion understands that he
25 has a criminal record.

1 MR. CRUZ: Well, your Honor, the object of the
2 extortion, according to the Government, is that the defendants
3 in this case --

4 THE COURT: No, no. The individual who was the object
5 of this extortion.

6 MR. CRUZ: The individual who is the object of the
7 extortion, that individual is, again, prompting a conversation
8 about a subject that leads, unfortunately, to this discussion
9 of a prior arrest, and what I am suggesting to the Court is
10 that the defendant's state of mind -- well, the defendant's
11 intent to cause or induce fear in the victim is the issue here,
12 and under these circumstances I'm suggesting that this
13 discussion or this mention of an arrest doesn't speak to that
14 intent.

15 THE COURT: Well, I am not so certain that I agree
16 concerning it. I am much more interested in the 403 question
17 and the larger question of bowdlerizing the transcript, how you
18 cut it out in a way that does not in some fashion distort the
19 full context.

20 MR. CRUZ: Well, your Honor, there are other
21 references in the transcript to the possession of a weapon.

22 THE COURT: I understand all of that. So, if I am
23 correct, I should look at this and say can that highlighted
24 portion be cut out? That is the management problem.

25 MR. CRUZ: Yes, your Honor.

1 THE COURT: The larger problem is does it distort the
2 conversation itself? I understand your contention that this is
3 a trained or at least advised cooperating witness --

4 MR. CRUZ: Yes.

5 THE COURT: -- who is trying to encourage someone to
6 say things that may be inculpatory. It may be more than
7 inculpatory. It may be unfairly prejudicial if they ever see
8 the light of day at trial.

9 MR. CRUZ: Well, and I think the gist of the argument
10 here, your Honor, is that there are other references to
11 Mr. Tkhalashvili's possession of a weapon in the past. If
12 this is the subject of the conversation, if this is what is
13 intended to induce fear in the victim, why is there a need to
14 also add a reference to an arrest?

15 THE COURT: All right. So, you are concerned about
16 the Government's case, that they don't need all of this, this
17 is enough. I think I understand that theory.

18 So, Ms. Kaplan, why not take it out? I would not let
19 you directly introduce prior convictions, so it comes in back
20 door. Does it have to come in?

21 MS. KAPLAN: I think that we can actually take out, on
22 Page 5 of Document 108, the Motion *in Limine* that was filed
23 yesterday or yesterday afternoon, the final attribution to
24 David Tkhalashvili. I think that can be removed, where he
25 says, "Because I don't have any problems. Everything is fine

1 with me, knock on wood. I haven't been arrested in 12 years.

2 One time I showed it and I got arrested, but that was -- I
3 haven't had any problems in six years." That's not a problem.

4 THE COURT: So, those two sentences, "I haven't been
5 arrested in 12 years," and, "I haven't had any problems," could
6 be taken out?

7 MS. KAPLAN: That's fine.

8 THE COURT: Okay. So, I think that that makes sense
9 under these circumstances. Now, it may come in in some other
10 circumstance, if the foundation is laid for its introduction,
11 but in presenting this to the jury, at least initially, in the
12 Government's case in chief, I take Ms. Kaplan's suggestion as
13 an appropriate one. So, we will permit that to be excised and
14 allow the Motion *in Limine* to that extent, bearing in mind the
15 larger issue of there may be circumstances in which prior
16 convictions of the defendants come out.

17 MR. CRUZ: I understand, your Honor.

18 THE COURT: So, let me -- I'm sorry.

19 MR. CRUZ: There was a second portion that I'm asking
20 the Court to redact, and that has to do with the witness named
21 Kristina Ursova, who is referenced in the transcript by
22 Mr. Torosyan. He, again, elicits conversation having to do
23 with a prior incident between Mr. Tkhilaishvili and Ms. Ursova
24 that had nothing to do with Allied Health Clinic. It was in a
25 previous clinic that they had been employed in together. There

1 is an allegation by in eliciting this conversation the way that
2 Mr. Torosyan describes it is that, "You knocked her out. You
3 hit her." First of all, that's a mischaracterization that is
4 based on the discovery we received --

5 THE COURT: What did he say in response?

6 MR. CRUZ: What he said in response was the following:
7 He says that the -- the alleged victim in the case says, "You
8 hit her in the office in front of the staff. You can't do
9 that." Essentially what the --

10 THE COURT: I'm sorry. "You hit her in the office in
11 front of the staff," and he says, "Yeah."

12 MR. CRUZ: Yes.

13 THE COURT: Okay.

14 MR. CRUZ: And just to put this in context, that's at
15 the prior employment.

16 THE COURT: I understand that, and we will get to that
17 in a moment, I think, and perhaps I will bookmark that part of
18 the Motion *in Limine*, because I do want to get to the question
19 of the introduction of the Davis evidence. I am not exactly
20 sure what the Government is proposing to introduce, and I will
21 get to that in a minute.

22 MR. CRUZ: Okay.

23 THE COURT: But it is part and parcel of the same
24 thing. If you look at it and say we are talking about someone
25 eliciting from a potential victim fear, and knowing that he is,

1 that is, ratifying a statement of violent treatment of someone
2 in the previous clinic, that would ordinarily come in.

3 Now, the concern here and the concern I have -- I will
4 front it now, we will get to it later -- is that I am concerned
5 that the predominant, maybe the almost entire effect of
6 introducing Classic Pizza and Davis is propensity evidence. It
7 can be tarted up in certain ways by using some of the language
8 of acceptable ways to introduce this evidence, but its
9 predominant impact, unless controlled in some fashion, is
10 propensity evidence, and it is not something I am likely to let
11 in. I am going to let in, I think, stuff that might touch on
12 Davis, have to, I think, and the question is how much.

13 MR. CRUZ: Right.

14 THE COURT: And the question of whether or not that
15 particular portion is going to be introduced is I think related
16 to how much else. If it were, "You beat up your girlfriend
17 before," unrelated to Davis --

18 MR. CRUZ: Yes.

19 THE COURT: -- then I don't think there would be a
20 problem. But it is related to Davis, so it presents a problem
21 that I want to address as we go along.

22 MR. CRUZ: Yes, your Honor. Yes, your Honor.

23 THE COURT: Okay?

24 MR. CRUZ: And in terms of the redaction, I mean, will
25 the Court at least consider doing that under the circumstances?

1 THE COURT: I will consider it, I am considering it,
2 but I am not going to put it into a ruling until I have dealt
3 with it in its broader context.

4 MR. CRUZ: All right. So, in other words, we are
5 going to see how this comes --

6 THE COURT: Right. We are having a conversation now.
7 At a certain point the conversation will come to an end and I
8 will tell you what I think is going to happen.

9 MR. CRUZ: I understand, your Honor. And I guess my
10 concern is will the Government be allowed to mention this issue
11 during the course of its opening statement?

12 THE COURT: I don't know. That is what this
13 conversation is going to lead to. Okay?

14 MR. CRUZ: All right.

15 THE COURT: So, now back to translation. Obviously,
16 my concern is that there not be any misunderstanding by the
17 defendants or the jury about what is being said in a foreign
18 language, and there have been some misgivings asserted by some
19 of the translators here about the dialects involved and
20 differences, and so Ms. Beatty, who is always ahead of all of
21 us, has been looking around to see that we get the properly
22 qualified translators, and at this stage it is going to be
23 quite expensive. That is not your business, it is mine, but it
24 is going to be quite expensive, because we are going to have to
25 bring in somebody from Los Angeles and somebody from New Jersey

1 to deal with that, but to ensure that there is accuracy in the
2 translations. I have to have two translators, just because
3 work rules among translators require taking turns on it. But I
4 want to know if there is anything else that I should be
5 concerned about with particularity in this question of
6 translation.

7 MR. CRUZ: If I may, your Honor, there was one thing
8 that the Government brought to our attention in terms of some
9 additional amendments or edits to the final version of the
10 transcript that were not done by a linguist translator, they
11 were done by the victim in the case, the alleged victim,
12 Mr. Torosyan, and, of course, I have a concern that if he is
13 allowed to comment on something that a translator/linguist
14 wasn't able to produce a response for, that there is some
15 amount of subjectivity that is being --

16 THE COURT: Well, let me tell you how I deal with that
17 or will deal with it. Number one, I do not want and do not see
18 a reason that there should be displayed to the jury a back and
19 forth or the editorial process, the markup process between a
20 translator and the person who was actually there. I assume
21 that this transcript and the conversation is going to come in
22 through -- and "John Doe A" is Mr. Torosyan, is it?

23 MS. KAPLAN: Yes.

24 THE COURT: I assume it is going to come in through
25 Mr. Torosyan, and Mr. Torosyan is going to say, I assume, "I

1 have read the transcript, I have reviewed the transcript, the
2 transcript accurately reflects what was said as translated and
3 as I understood it," and that is where it lands. It does not
4 go any farther than that, unless somebody wants to tell me that
5 they want to have it go farther than that. People deal with
6 and try to finalize transcripts up to the last moment, and I do
7 not want to burden the process with the potential that they are
8 going to get, not sandbagged, but you understand what I am
9 talking about, sandbagged with somebody saying, "Well, in draft
10 number five you said that this word meant this and that." All
11 we are going to have is that transcript, and Mr. Torosyan, you
12 can go after Mr. Torosyan about, "Does it mean that, does it
13 mean this," but not by reference to legislative history of the
14 transcript.

15 MR. CRUZ: Sure, sure. But as far as those final
16 edits, what I had mentioned to Ms. Kaplan was that I didn't
17 have a problem with the final edits that were done by
18 Mr. Torosyan, as long as they were reviewed by a linguist, and
19 that person could give an opinion about whether they agreed
20 with that or not.

21 THE COURT: Well, that introduces this new dimension
22 or potential for --

23 MS. KAPLAN: And that's my fault. I neglected to get
24 back to Mr. Tumposky and Mr. Cruz. We did check with the
25 linguist, and those changes are consistent with the linguist's

1 understanding. If he wants something in writing, we --

2 THE COURT: So, a problem has been solved.

3 MS. KAPLAN: Yes.

4 MR. CRUZ: Thank you.

5 THE COURT: So, what you have got is the transcript.

6 Your clients may say, "That is not accurate," and that is why I
7 started by saying we have got a concern about accuracy.

8 Now, Mr. Torosyan, my simple understanding of nations
9 around the Black Sea, is Armenian?

10 MR. CRUZ: Yes.

11 MS. KAPLAN: Yes.

12 THE COURT: So, do we have a problem with his
13 translations here, dialectic, anything like that?

14 MS. KAPLAN: Not that I'm aware of, your Honor.

15 MR. CRUZ: And, your Honor, and I think you are aware
16 of this, but the parties that are part of this conversation,
17 Mr. Torosyan, Mr. Tkhalashvili, they speak two completely
18 different languages, Armenian and Georgian, but the overlay is
19 the common Russian language.

20 THE COURT: Right.

21 MR. CRUZ: So, they are doing their best, in other
22 words, depending on their expertise or level of understanding
23 of Russian to communicate things to each other in essentially a
24 different language --

25 THE COURT: I think I understand that. What I do not

1 want is for somebody to pop up in the middle of the trial and
2 say, "Wait a minute, we don't know who is saying what to whom
3 in what language," that kind of thing. We think we have the
4 gold standard for Georgian interpreters here. We have an
5 overlay, as you say, of Armenian in it, and they are speaking
6 to each other in Russian in some fashion. I think we have got
7 everything covered, but because earlier translators expressed
8 some misgivings or concern that they did not have all of the
9 relevant competences entirely, I wanted to be sure that we were
10 on the same page on this. So, I understand that there is not
11 an issue. We will get, as I said, the best people we can find
12 in the country to try the case. All right?

13 MR. CRUZ: And, your Honor, just so that I'm clear on
14 this, there isn't any issue with regard to the translation of
15 these conversations by these linguists, but I want to be sure
16 that I'm not crossing a line when I suggest, and this is
17 according to their linguist and their translator, that my
18 client's competency in Russian was not very good.

19 THE COURT: Well, I don't know how you are going to do
20 that, but I think you may have to do it through Mr. Torosyan,
21 unless your client is testifying.

22 MR. CRUZ: Well, I think I can do it through their own
23 linguist translator who comments and it's a part of the
24 transcript.

25 THE COURT: Well, having done a fair number of

1 transcript cases myself in various incarnations, and
2 understanding the dangers that are presented by that kind of
3 thing, how is this coming in, Ms. Kaplan?

4 MS. KAPLAN: Well, on the transcripts the linguists
5 did note that one of the defendant's Russian skills was poor
6 and unintelligible.

7 THE COURT: So, ordinarily, annotated transcripts
8 don't come in, and I don't know if you are planning on putting
9 the translator on or the interpreter on.

10 MS. KAPLAN: No.

11 THE COURT: Are you? Because let me just tell you
12 about the transcript. The transcript is the transcript.

13 MR. CRUZ: Yes.

14 THE COURT: "Here is the transcript --"

15 MR. CRUZ: Absolutely.

16 THE COURT: -- without saying, "I give him a C plus
17 for his Russian skills." It is whatever was said on this is
18 what is involved.

19 MR. CRUZ: Yes.

20 THE COURT: Now, if we have an expert witness
21 translator who comes in and says he does not speak Russian very
22 well, that is a different issue, but it would have to be in
23 there separately, not by annotation.

24 MR. CRUZ: Well, I believe that, Ms. Kaplan can
25 correct me if I'm wrong, but we have discussed this already. I

1 believe she agreed that that was something that I could state,
2 because those are two different issues. The transcript is
3 accurate, the transcript is accurate, but the other issue is is
4 the client's ability to speak the language questionable, and
5 that's a separate issue.

6 THE COURT: So, are we going to have a disembodied
7 translator stating in an annotation to the transcript that his
8 skills are limited?

9 MR. CRUZ: Yes.

10 THE COURT: That is the agreement here?

11 MS. KAPLAN: Well, we turned over the transcripts with
12 the annotations. And, frankly, I hadn't focused, your Honor,
13 on the fact that that cover page probably shouldn't have been
14 on it. It should have just been the transcript.

15 THE COURT: Well, okay, but now we are talking about
16 we are going to try the case, and so I don't know where the
17 linguist or translator, or whoever it is, is and whether or not
18 you want to put someone like that on the stand for this kind
19 of -- whether Mr. Cruz does or you for this kind of thing. I
20 am just looking at it from the perspective of somebody popping
21 up in the middle of the trial and saying, "Hearsay, your
22 Honor," and it is a pretty good evidentiary objection under
23 these circumstances. By contrast, if you don't care, if that's
24 a quick and efficient way to get it in front of the jury or a
25 comment in front of the jury, I don't mind, but I don't want a

1 surprise. That's all.

2 MS. KAPLAN: I think the Government's fine just
3 leaving it as is, if you have no problem with the annotation on
4 the transcript.

5 THE COURT: No, I don't, unless somebody is going to
6 raise it. If it is an efficient way of getting this particular
7 contention before the jury, that is fine.

8 MR. CRUZ: And, your Honor, I don't intend to
9 elaborate on what the linguist said in the transcript to any
10 degree further than what is listed there.

11 THE COURT: All right. So, that helps me to
12 understand a little bit more about this.

13 You are in an unaccustomed quiet, Mr. Tumposky. Do
14 you have any concerns about things being lost in translation?

15 MR. TUMPOSKY: Not on the translation. My main issue
16 is going to be on the 404 evidence, when the Court is ready to
17 hear that.

18 THE COURT: Okay. So, then, let's step back a bit.
19 The Government has provided a kind of comprehensive response to
20 the several motions of the defendants, and I simply propose to
21 go through that. But, first, I want to start with the
22 summaries, which is Docket Number 88. I assume that they have
23 been shared with the defendants, or if they have not they are
24 going to be.

25 MS. KAPLAN: They have been shared, yes.

1 THE COURT: Okay. And any problems with them, apart
2 from their evidence? My only concern is if they distort
3 somehow the evidence in the case or are argumentative.

4 MR. TUMPOSKY: I think there was the one issue that we
5 flagged, and I guess there was agreement on that --

6 MR. CRUZ: Right.

7 MR. TUMPOSKY: -- that that was fixed.

8 MR. CRUZ: There were two transactions that had been
9 separated from a grouping, and those are the two transactions,
10 I believe, that relate to the embezzlement count. We had
11 discussed why they needed to be separated. It's an issue for
12 the jury as to whether or not those transactions are
13 questionable. We don't need to add the overlay of them being
14 separated in a summary chart. So, I would ask the Government
15 if they could just include it with the larger grouping so
16 there's no distinction that the jury may draw an inference
17 from.

18 THE COURT: Okay.

19 MS. KAPLAN: And we did that.

20 THE COURT: Okay. So, I assume that those will come
21 in here. Part of my assumption in dealing with these sorts of
22 things is to outline what is fair game in an opening statement
23 here. The use of the summary would be fair game. I don't know
24 whether it is significant enough to justify it, but, in any
25 event, it can be done that way.

1 Now we get to what I will call "84," which is David's
2 "thieves-in-law" reference, and I just want to be sure that we
3 are on the same page as far as how that is going to be
4 characterized. I understood that it is simply going to be
5 identified as a term for Russian organized crime, no more, no
6 less.

7 MS. KAPLAN: Correct.

8 THE COURT: And that the witness is not going to all
9 of a sudden say, in particular, this kind of aspect of it. It
10 is simply that the definition is "Russian organized crime."
11 That's it.

12 MS. KAPLAN: Right. He might say, "Like the mafia,"
13 but that's it.

14 THE COURT: All right. You understand what the
15 presentation is here. Now, is that agreeable?

16 MR. CRUZ: Well, your Honor, except for the mafia,
17 quote, unquote, part. That's just a characterization that I
18 don't think is necessary.

19 THE COURT: And I feel the same way about it. I would
20 like to have it simply at "Russian organized crime," unless
21 there is some special reason for proliferating the meaning of
22 "thieves-in-law" by comparison to Mediterranean terminology.

23 MS. KAPLAN: Well, it's only I'm not exactly sure when
24 I ask the witness what he's is going to -- I have spoken to him
25 before.

1 THE COURT: Oh, I think you should become sure of what
2 the witness is going to say.

3 MS. KAPLAN: If you want me to instruct him not to use
4 the word "mafia," I will do that.

5 THE COURT: Yes. Just say that, "We have agreed upon
6 the definition to avoid any other problems, so when you are
7 asked what 'thieves-in-law' is, the definition that you are
8 limited to is 'Russian organized crime.'" Now, if somebody
9 comes in and says, "Well, what do you really mean by 'Russian
10 organized crime,'" then Katie bar the door, but for purposes of
11 moving this along, that is the way I would like you to do it,
12 and so he could get instructed and there will not be any
13 sandbagging. I cannot imagine there will be any sandbagging,
14 but if there is I would simply say, "Ladies and gentlemen, just
15 to save your time," to the jury, "I instructed that we will use
16 that definition here so we can move along."

17 MS. KAPLAN: Okay, your Honor.

18 THE COURT: So, we are all on the same page and agreed
19 on that; is that right?

20 MR. CRUZ: Yes, your Honor.

21 (Mr. Tumposky nodded affirmatively)

22 THE COURT: So, I allow the Motion 84 to the extent
23 that thieves-in-law, at least when initially presented by a
24 witness, will be identified as a term for "Russian organized
25 crime."

1 Now, I come to the three pictures here, and I think I
2 understand the Government to want to have or be prepared to
3 rest with just one of those pictures; is that it?

4 MS. KAPLAN: Yes, but not the picture that I was
5 referring to in this motion. So, there was a picture the
6 Government wanted to put into evidence which is a picture of
7 David Tkhilaishvili at a shooting range, and I think that the
8 Government has now agreed that we don't need to introduce that
9 photo.

10 But the one that I had forgotten to press the issue on
11 is there was a photograph of an American Express Card in the
12 name of one of the witnesses, Olga, and I won't even attempt to
13 pronounce her last name right now, that --

14 THE COURT: You are going to work all weekend to be
15 able to pronounce it.

16 MS. KAPLAN: I know I am going to have to do that --
17 that David Tkhilaishvili had that credit card in his wallet at
18 the time of his arrest. So, it's a picture of the back of the
19 credit card. And that's the only picture I would be seeking to
20 introduce with respect to the search of the computer or any of
21 the items.

22 THE COURT: So, turning back, then, to the Motion in
23 Limine Number 89, that is allowed, upon the Government's
24 representation that it will not be using those three pictures.

25 Turning to the picture that they do want to use or

1 that the Government does want to use.

2 MR. CRUZ: Your Honor, I would maintain an objection
3 to that, because the issue here is, at least I believe from the
4 Government's perspective, whether Mr. Tkhliaishvili had
5 possession of that credit card. That credit card was issued to
6 Olga Dorofyeyeva, and she was an employee of Allied Health.
7 That credit card there is no dispute was utilized by people at
8 the clinic for things such as buying supplies that were
9 necessary for the business, et cetera. The Government is also
10 contending that the credit card was used for personal purposes.
11 I don't see the need to introduce a photograph that --

12 THE COURT: What is the problem? What is the problem
13 with the --

14 MR. CRUZ: We are not disputing it, I guess is the
15 issue.

16 THE COURT: So, what is the problem with, "Here is the
17 object that is used to access the funds"? It is a totem, I
18 suppose, is one way to refer to it. But, in any event, I don't
19 understand what the problem is. If it showed the witness in a
20 compromising position or showed the defendant threatening the
21 witness, that is another issue. This is simply, "Here is the
22 card that was used for," according to the Government -- it is
23 up to the jury whether they think so -- "Here is the card that
24 was used for purposes of the improper transactions."

25 MR. CRUZ: Well, I think that what may be the issue is

1 whether the photograph in and of itself is misleading in any
2 way. It is a photograph --

3 THE COURT: How is it misleading?

4 MR. CRUZ: Well, it's taken from Mr. Tkhliaishvili's
5 computer. There's nothing that I have been provided with that
6 lays a foundation of what the context of taking the picture
7 was, whose possession the card was in when the picture was
8 taken, whether it's a picture that was produced by Ms. Olga or
9 some other employee of --

10 THE COURT: Maybe I jumped ahead, but I assume it is a
11 credit card that is issued to a particular employee for the use
12 of a particular employee on behalf of the company, that is,
13 Olga.

14 MR. CRUZ: Yes.

15 THE COURT: And, ordinarily -- I haven't seen Olga,
16 but she probably does not look like David Tkhliaishvili.

17 MR. CRUZ: Yes, your Honor. I understand, your Honor,
18 and I don't know if you have been provided with the picture
19 itself.

20 THE COURT: No.

21 MR. CRUZ: But it is the back of the credit card. You
22 can see the credit card number. There's no signature on it, I
23 don't believe.

24 THE COURT: Right. But somebody who is handling the
25 negotiation of the credit card is going to look at Olga and

1 then look at David Tkhilaishvili and say, "You have changed a
2 good deal since that photograph was made."

3 MR. CRUZ: Well, I mean, I don't think that there's
4 any allegation that Mr. Tkilaishvili had the credit card, if
5 that's what this picture depicts, in terms of his actual
6 possession of the credit card without authorization. I don't
7 think there is any issue as far as that is concerned.

8 THE COURT: Maybe I am getting in too deep on this.
9 Are you going to use the credit card itself or the picture?
10 What's going on?

11 MS. KAPLAN: There is going to be testimony about
12 Defendant Tkilaishvili asking Olga to take the credit card out
13 in her name because he had poor credit; and, in fact, upon his
14 arrest that credit card -- and he used that credit card for
15 Allied Health expenses and for other expenses, and upon his
16 arrest that credit card was in his wallet. So, it's
17 corroborative of the testimony of the witnesses.

18 THE COURT: I'm sorry, but I just don't see the issue.

19 MR. CRUZ: That's fine, your Honor, but I didn't want
20 the Court to think that that credit card was photographed when
21 he was arrested. It wasn't. This was just a picture that was
22 taken off of the --

23 THE COURT: You mean that he was attempting to pass
24 himself off as Olga at booking?

25 MR. CRUZ: Not that he was passing himself off as a

1 woman, but that he had the card without authority, in other
2 words.

3 THE COURT: That is for the Government to develop,
4 and, apparently, they will develop it in some fashion, whether
5 it is with authority or without authority, but, in any event,
6 as a way of avoiding difficulties created by his own credit
7 problems. And that is at least what he tells Olga? Am I right
8 about that?

9 MR. CRUZ: Right.

10 MS. KAPLAN: And just so we are clear, that picture
11 didn't come off of the computer. That picture was in his
12 wallet when he was arrested in his apartment.

13 THE COURT: Is the picture different from the credit
14 card?

15 MS. KAPLAN: Not that I'm aware of.

16 THE COURT: No, but is it unattached from the credit
17 card?

18 MS. KAPLAN: I'm sorry. Is the picture --

19 THE COURT: Sometimes credit cards have pictures of
20 the person who is authorized to use it.

21 MS. KAPLAN: There is no picture.

22 MR. TUMPOSKY: It's a photo of the credit card sitting
23 on a table.

24 MS. KAPLAN: It's a photo of the back of the credit
25 card.

1 THE COURT: Well, okay.

2 MS. KAPLAN: You can see the name of "Olga," and I
3 think you can see the number of the credit card.

4 THE COURT: So, it is found on his computer; is that
5 it?

6 MS. KAPLAN: It's found in a wallet at his apartment
7 at the time of the arrest.

8 THE COURT: So, if he wanted to call up amazon.com and
9 say, "I would like to order a book," he could use that credit
10 card there?

11 MS. KAPLAN: Right.

12 THE COURT: Okay.

13 MR. CRUZ: Right.

14 THE COURT: So, I don't see a problem with it.

15 MR. CRUZ: Okay.

16 THE COURT: So, I think we have dealt with 89 already.

17 Now, the term "extorted," again, this is Motion
18 Number 85, I don't know whether this is simply making sure that
19 the witnesses don't go off into a discussion of terms of art
20 here, but it would strike me that they can offer their
21 percipient observations without using the word "extorted,"
22 Ms. Kaplan.

23 MS. KAPLAN: I don't anticipate the witness will use
24 the word "extorted," and I will also instruct the witness not
25 to.

1 THE COURT: So, that is allowed to the extent the
2 Government will be authorized to instruct the witnesses not to
3 use a particular term here. Again, if there is some suggestion
4 of some sandbagging, I will deal with that with instructions to
5 the jury.

6 Number 91 is the cell phone that, as I understand it,
7 David paid for on Jambulat's cell phone with improper funds,
8 what the Government contends are improper funds.

9 MR. TUMPOSKY: Yes. The allegation is essentially
10 that he took out I think it was five cell phone accounts and
11 distributed them to several of the employees, including
12 Jambulat. Jambulat is not charged with any financial-related
13 crimes, and so my position is that it's not relevant that he
14 was, in fact, one of the recipients of a phone. It's not
15 relevant to the case against him.

16 THE COURT: So, what are we going to say, that a phone
17 was improperly paid for by David and made available to JT? If
18 you want an instruction to the jury, I will give an instruction
19 to the jury, but I don't see that as an issue.

20 MR. TUMPOSKY: Well, my suggestion would be that the
21 employees could be identified in some other fashion other than
22 by name, or just simply that there were five employees. I
23 don't think it really matters who they were. The Government's
24 position is that no one was supposed to get a phone, so whether
25 they were secretaries or presidents doesn't really matter.

1 Their position is no one should have gotten one. So, can we
2 just say he gave phones for five employees, no employees were
3 supposed to get them, and that's that?

4 THE COURT: Ms. Kaplan, any view about that?

5 MS. KAPLAN: I don't think I have a problem with that
6 other than I think the phones may have been in the names of
7 some individuals who were not employees of Allied Health. So,
8 I could ask -- I could have him testify employees and other
9 individuals who are not employed by Allied.

10 THE COURT: Individuals who were not authorized to
11 receive them, the monies were used for that. Okay, that's the
12 protocol that we will describe, again, subject to some
13 refinement if a door is opened or there is some reason to think
14 that it is unfair to tie the Government's hands in that way.
15 But that seems to me to be a way around the problem of two
16 separate types of charges in which one defendant is not charged
17 in the question of embezzlement.

18 So, then we have sequestration. I understand there is
19 no objection to the sequestration orders here. You are going
20 to have to police it to some degree yourselves. I will not, or
21 I can't; I don't know who these people are there. But you will
22 tell them that, both, they are not supposed to be in the
23 courtroom, and they are not supposed to discuss their testimony
24 among themselves here. So, that is allowed.

25 And I think, then, that brings us back to the question

1 of prior bad acts, and what I think I need to know from you,
2 Ms. Kaplan, is how you are going to be attempting to introduce
3 this. You have in mind my view from 25,000 feet that this is
4 largely propensity. There may be reasons, but it is largely
5 propensity, and so I want to understand how you propose to
6 introduce --

7 MS. KAPLAN: I think in our reply I tried to narrow
8 what the Government will try and do here, and I think that with
9 respect to Davis Clinic there is an awful lot of overlap.

10 There are many of the same employees that were at Davis Clinic.

11 THE COURT: Can I interrupt you by asking if we talk
12 about that they were employees of a prior business here, don't
13 we deal with that without getting into the suggestion or the
14 contention that the prior business was basically fleeced in the
15 same way or the principal involved was fleeced in the same way
16 as is charged here? I am not thinking of excluding things
17 about saying, "You worked in a prior business that was called
18 'Davis,' you were 'X,'" but I don't think I want to get into
19 the trial itself the secondary bad act, I mean, proving the
20 other bad act, which is, of course, a criminal bad act.

21 MS. KAPLAN: Right, and I understand that, unless, of
22 course, the door is somehow opened, which it may very well be
23 opened.

24 THE COURT: With respect to opening doors, don't act
25 on your own, or anyone don't act on your own knowledge. If you

1 think a door has been opened, come up and see me at sidebar.

2 MS. KAPLAN: Okay. So, there's all the interconnected
3 relationships, and I understand that your Honor doesn't have an
4 issue with that. The other thing where it comes up is that it
5 goes to some motive on the part of the defendants, because they
6 owed money to some of the individuals at Davis, which is why
7 they are trying to get Mr. Torosyan's interest at Allied, and
8 that was part of the reason that they needed to pay people
9 back. So, again, we don't have to go into the embezzlement of
10 funds, and I won't do that unless the door has been opened and
11 we have gotten your permission to do that.

12 THE COURT: Okay. That seems fair to me. I will hear
13 from the defendants on it, but that seems a fair way of drawing
14 the line on this, and it may go to the bias of the witnesses
15 themselves, too.

16 MR. TUMPOSKY: And I think that is right in the
17 general sense, and I want to highlight this issue, because it
18 is going to be an issue during the course of the trial, which
19 is that not everything applies to both. There's no evidence
20 that I've seen that Jambulat owed money to anyone, and so I
21 think it's just important that we be careful in applying
22 certain rules to --

23 THE COURT: As to that, I would think about
24 instructing the jury, but I probably believe that the Court
25 helps those who help themselves, and so you bring it out on

1 cross-examination. "You are not saying this about Jambulat?"

2 MR. TUMPOSKY: Jambulat or James.

3 THE COURT: "You are not saying that about James?"

4 "No." "Thank you." And sit down, unless you think you are
5 going to get something more out of these witnesses. So, that
6 is the way I would prefer to have it. If it turns out to be
7 some problem, then you will ask for some instruction, but I
8 don't think it is going to be an instructional problem.

9 MR. CRUZ: Your Honor, with regard to the
10 interconnected relationships, I don't have an objection to
11 getting into employee overlap, certainly, in some context to
12 how Allied started the precursor with the Davis Clinic,
13 et cetera.

14 THE COURT: Right.

15 MR. CRUZ: But we get back to the issue of this
16 witness, Kirstina Ursova, and when Ms. Kaplan states that the
17 defendants owed people from Davis money, we're really only
18 talking about one issue, which is David Tkhilaishvili
19 supposedly owed money to Kristina Ursova, which therefore
20 would, according to the Government, motivate him for some
21 reason to threaten Victor Torosyan with regard to reducing his
22 interest or --

23 THE COURT: Well, as an alternative source of monies
24 to pay off the previous person who claims an interest.

25 MR. CRUZ: Yes. And I guess that may be an issue, but

1 to take it a step further and talk about a domestic dispute
2 between them that again relates --

3 THE COURT: That part I don't know about. So,
4 explain --

5 MR. CRUZ: It's interconnected, because I think the
6 Government wants to get into that as well.

7 THE COURT: So, Ms. Kaplan?

8 MS. KAPLAN: So, first, I just want to correct that
9 it's not just Ms. Ursova that was owed money. It was an
10 individual by the name of Saba who was involved to some extent
11 in Davis, as well as Olga, who it appears at various times
12 David Tkhaishvili was promising her some interest in Allied
13 because of the work she did at Davis.

14 There was an incident that occurred at Davis Clinic
15 between -- an altercation between David Tkhaishvili and
16 Kirstina Ursova at Davis Clinic, and this was witnessed by
17 Kenton Fabrick, who was an employee at Davis Clinic and then
18 went over to Allied, and he'll testify, and at some point
19 Mr. Torosyan became aware of this physical altercation that
20 occurred.

21 THE COURT: So, let me just pause with it. Is it
22 domestic abuse? Do they have a relationship of some sort apart
23 from the business?

24 MS. KAPLAN: No.

25 MR. CRUZ: I understand that they did, your Honor.

1 THE COURT: Well, in any event, whether they did or
2 not --

3 MS. KAPLAN: I'm sorry, I'm sorry. Yes. I misspoke.
4 Yes, they did. But this occurred at the workplace.

5 THE COURT: And so, the Government's evidence is, as I
6 understand it, he smacked her?

7 MS. KAPLAN: Yes.

8 THE COURT: And so, Mr. Torosyan learns about this at
9 some point. How did he learn about it?

10 MS. KAPLAN: He learned about it from either Olga or
11 Kenton Fabricick, I believe, but he learned about it before -- in
12 between the various threats that he was getting from the
13 defendant. So, it goes to his state of mind.

14 THE COURT: One other question: Is there evidence,
15 direct evidence, that David knew that Mr. Torosyan knew about
16 him smacking -- her name eludes me right now.

17 MS. KAPLAN: Kristina Ursova.

18 THE COURT: Kirstina.

19 MS. KAPLAN: I don't know. I'm not aware of that.

20 THE COURT: All right.

21 MR. CRUZ: Your Honor --

22 MS. KAPLAN: Well --

23 THE COURT: I said "direct evidence." You may say
24 that there is circumstantial evidence of it, but I just want to
25 understand what it is that David understood that the purported

1 victim or intended victim understood about his tendencies to
2 resolve conflicts by smacking people.

3 MS. KAPLAN: So, that takes us back to where we
4 started today, and that was the transcript of a conversation
5 between David Tkhlalaishvili and Mr. Torosyan about the incident
6 with Kirstina Ursova where they are discussing the incident.

7 THE COURT: All right. Okay.

8 MR. CRUZ: So, your Honor, first of all, you asked how
9 Mr. Torosyan learned about this incident, and the Government
10 responded that he heard either from Olga or from Kenton, who
11 worked at Davis Clinic. First of all, Olga, according to the
12 discovery, never witnessed the incident. She overheard them
13 arguing.

14 THE COURT: Well, she could communicate that. She
15 could communicate to someone else that she heard that David had
16 assaulted Kirstina.

17 MR. CRUZ: Quite frankly, I don't know what she told
18 him. She didn't --

19 THE COURT: It doesn't make any difference, from my
20 perspective. As an evidentiary matter, it does not make any
21 difference whether she saw it or not. That she communicated it
22 to Mr. Torosyan is the critical part for this purpose.

23 MR. CRUZ: What I want to focus on is the Court had
24 described it as he had smacked her, quote, unquote.

25 THE COURT: That was a shorthand way.

1 MR. CRUZ: No, I understand. And that's actually what
2 Mr. Torosyan brought up in the conversation in the transcript.
3 But my issue is that Kenton Fabrick, which is the person who
4 witnessed the incident, was interviewed by the FBI and
5 effectively stated that he witnessed an argument, a verbal
6 argument between them, that David did not threaten Kirstina,
7 and that he pushed her against a table. That was the extent of
8 it. So, first of all, for Mr. Torosyan to say that, "Kenton
9 Fabrick told me about this," and then to characterize it as he
10 knocked her out or he smacked her --

11 THE COURT: What we have in the transcript is a
12 ratification by David.

13 MR. CRUZ: I agree he didn't deny it, but what I'm
14 saying is --

15 THE COURT: He said, as I recall -- I should have that
16 transcript in front of me. I don't.

17 MR. CRUZ: I think he said, "She made me do it," or
18 something to that effect.

19 THE COURT: Well, he says, "Yeah," I think, something
20 like that. Maybe you can get me the transcript. But he
21 ratified it. Now, you may minimize it. You may say it was
22 just a shove over to the table.

23 MR. CRUZ: Well, I'm not saying this. Kirstina Ursova
24 herself said it.

25 THE COURT: But you may bring it out and develop it,

1 that life has those moments in which people resort to some
2 modest physical encounter.

3 MR. CRUZ: I understand, your Honor. But despite the
4 fact that Mr. Tkhlalaishvili accepted or didn't contest what
5 Mr. Torosyan was saying, Mr. Torosyan's understanding of what
6 happened was wrong, to begin with, it was erroneous.

7 THE COURT: Well, it doesn't make any difference
8 whether it was wrong. It is what he believed. And maybe even
9 a further point, and it is one I want to end this on, which is,
10 going through the questions of instructions does it make any
11 difference, particularly when we are dealing with a cooperating
12 witness like this, what Mr. Torosyan actually believed or what
13 David believed Mr. Torosyan believed for purposes of the
14 intent?

15 MR. CRUZ: Well, the focus should be on the defendant
16 or the person who is --

17 THE COURT: So, now he is presented with a witness who
18 says, or call him a mark, who says, "You hurt her," or, "You
19 hit her." And, frankly, maybe I should have the precise text
20 in front of me. If you have an extra copy, or maybe if I could
21 steal somebody's copy, it would be helpful.

22 MR. CRUZ: I understand, your Honor.

23 THE COURT: Anybody?

24 MR. TUMPOSKY: I only have it electronically, your
25 Honor. I don't know if that would help.

1 MS. KAPLAN: I have it.

2 THE COURT: If you could surrender for present
3 purposes just that portion of it.

4 (Document provided to the Court by Ms. Kaplan)

5 (Pause)

6 THE COURT: So, what we have, let me give perhaps a
7 dramatic reading in which Mr. Torosyan says, "You understand
8 you have no right to touch her?" "Wait. Touch who?", says
9 David. Mr. Torosyan says, "Kirstina. You hit her in the
10 office in front of staff. You can't do that." David says, "In
11 front of Kenton." Mr. Torosyan says, "In front of Kenton."
12 David says, "It's ours. She made me do that, and anyway,
13 because" -- and then Mr. Torosyan says, which is probably
14 critical to all of this, "Well, so you might get agitated and
15 hit me also. You're not normal."

16 Okay. That reflects his perception, Mr. Torosyan's
17 perception, and to the degree that I parse this for purposes of
18 attempt or conspiracy, to say what is critically important is
19 what David believes, David has been told about what the mark
20 believes, and that is in his mind, and it seems to me it gets
21 in.

22 MR. CRUZ: Well, your Honor, what I will note, and
23 this is cited in my filing with the Court, the Goodoak case,
24 the First Circuit case, that states that the Court also noted
25 that where the victim is afraid, quote, unquote, because he

1 holds a belief that is erroneous, that state-of-mind evidence
2 is arguably less probative on the question of whether the
3 defendant attempted to induce fear.

4 THE COURT: Well, that goes to the larger question of
5 a sting operation, and it seems to me that, while I understand
6 that language, it really is a caution or adjuration to me to be
7 careful about letting this kind of stuff in.

8 But, all that having been said, it seems to me right
9 on point under either of the theories here of whether or not I
10 should permit the jury or instruct the jury they have to think
11 about the state of mind of the person who is the mark, a
12 difficult issue when the mark already knows what the scheme is
13 that they are trying to develop by undercover activity, and
14 David's approach.

15 Let me pause with one thing while you are thinking
16 about your response to that. I keep using "David" and "James"
17 or "Jambulat." I don't want to demean anybody, and I am always
18 concerned about using first names in a familiar way that
19 suggests second-class citizenship, and I have problems with
20 names. You are all forewarned about it. But is there a
21 preference about referring to the defendants here or others
22 with names that are hard, for me anyway, to pronounce?

23 MR. TUMPOSKY: I would be fine with "James." I don't
24 have an issue with that.

25 THE COURT: Okay.

1 MR. CRUZ: Neither do I, your Honor.

2 THE COURT: All right. So, Ms. Kaplan, unless there
3 is some reason why I should be much more formal about it, I may
4 slip into informality here, and I do not mean in any way to
5 denigrate the individuals involved. I just want to be sure I
6 am able to communicate my understanding of who I am talking
7 about. Okay?

8 So, back to this issue. It is evidence. Is it
9 overwhelming evidence? David says she made him do it. I don't
10 know what that means, but he got mad as hell at her and he
11 smacked her, or pushed her, or edged her toward the table,
12 whatever it is. But she made him do it.

13 MR. CRUZ: And I think that's part of the problem,
14 your Honor, is that whatever Mr. Torosyan believed happened was
15 in error in the first place, because other people have stated
16 what Mr. Torosyan is describing didn't happen.

17 THE COURT: So, Mr. Torosyan, too, said what I
18 consider to be critically important on this issue: "Well, so
19 you may get agitated and hit me also. You're not normal."
20 That is the expression of the person that David is confronting
21 who says, "I'm fearful of you. You might do it to me. And, by
22 the way, you're not normal," for whatever that means. But it
23 suggests that he is in a fearful state and that David
24 understands that he is in a fearful state. A jury could find
25 that David understood it. David could also understand it is

1 just whiskey talk.

2 MR. CRUZ: Well, your Honor, then I will end with this
3 quote again from Goodoak, where the Court states that, "Where,
4 on the other hand, the defendant did not expect and should not
5 have expected to produce a given state of mind, evidence that
6 such a state of mind resulted will tell the jury little about
7 whether the defendant, in fact, attempted to frighten the
8 victim."

9 And in this particular case I would suggest David
10 wouldn't have expected to engage in this conversation but for
11 Mr. Torosyan bringing it up in the first place.

12 THE COURT: Well, that is certainly true.

13 MR. CRUZ: And if he spontaneously said these things,
14 that's one thing, your Honor, but that's not how it went.

15 THE COURT: Okay. I think I understand this enough to
16 say I am not going to exclude it here. It is part of the
17 transcript. The other portion the Government has agreed upon
18 taking out, but this stays in.

19 MR. CRUZ: Note my objection, your Honor.

20 THE COURT: Okay.

21 MR. TUMPOSKY: So, I think on the broader issue of 404
22 evidence, and if the Court thinks this is useful, I see it in
23 three categories. One would be prior bad acts that the
24 victim --

25 THE COURT: I don't mean to cut you off, but I think I

1 can cut you off, because we are not talking about anything
2 other than this, are we?

3 MR. TUMPOSKY: Well, I have --

4 THE COURT: No, but I don't understand the Government
5 to being offering Classic Pizza or, while there was an
6 initiative to offer Davis, we have pared Davis down to
7 interrelationships arising out of it and perhaps money owed to
8 Davis employees that would be funded by the alleged
9 embezzlement or extortion here.

10 MS. KAPLAN: Correct.

11 MR. TUMPOSKY: I just want to be clear.

12 THE COURT: You pretty much won.

13 MR. TUMPOSKY: I appreciate that, so I won't say too
14 much.

15 THE COURT: Right.

16 MR. TUMPOSKY: But that in the discovery that was
17 produced there's various mentions of supposed previous acts of
18 violence that were testified to -- or not testified to -- but
19 that witnesses describe, not the victim but other people.

20 THE COURT: The guiding principle, and I think
21 Ms. Kaplan understands this, but let me just state it so that
22 everybody does, to the degree that the witness has expressed a
23 concern or is aware of prior acts of violence by the defendants
24 here, I think it's fair game to bring it in. Now, does it come
25 in as a conviction? No. Does it come in if somebody observed

1 prior violence but the victim was not made aware of it? No.
2 That is a tree that fell in the forest without the victim
3 around. But if there's evidence to support the idea that the
4 victim is aware of it, then it comes in.

5 MR. TUMPOSKY: Well, can I just make a separate point?

6 THE COURT: Can come in. Maybe stuff that if he
7 kicked a cat or something like that, that may not do it.

8 MR. TUMPOSKY: On that limited issue about violence or
9 acts of violence that are communicated directly to the victim,
10 what the evidence in this trial is going to be, as I understand
11 it, is primarily testimony from the alleged victim and
12 recordings that depict conversations between the victim and the
13 co-defendant, not my client, the co-defendant David. In those
14 conversations the Government claims David references his prior
15 misdeeds but also references prior misdeeds of James, and
16 there's no evidence that James intended to communicate those
17 prior misdeeds.

18 THE COURT: What are we talking about with
19 specificity?

20 MR. TUMPOSKY: Shot someone in the head, stabbed
21 someone back in Georgia, or wherever it was. David says that,
22 "My brother did these things."

23 THE COURT: Then, it seems to me it's probably a
24 cautionary instruction that I am going to have to deal with,
25 because what David is saying is, "I have a number of arrows in

1 my quiver, and one of them is that James is also a violent
2 person." That comes in. Now, as to David and probably as to
3 James under co-conspirator hearsay law, if the Government is
4 able to satisfy Petrozziello and Bourjaily kinds of issues.

5 MR. TUMPOSKY: Well, there is still a question of
6 relevance, even if it comes in as a co-conspirator --

7 THE COURT: Oh, I think it's relevant. "Here we are,
8 we can hurt you in a variety of different ways. I can do it
9 like I did to Kirstina," whatever that was. "James can do it
10 because he shot somebody when he was in Georgia."

11 MR. TUMPOSKY: And what I would say is it's probably
12 under that below threshold relevant to the case against David.
13 My concern is that the overflow prejudice --

14 THE COURT: Why isn't it relevant to a conspiracy? If
15 we assume that they have entered into a conspiracy -- I'm not
16 assuming it -- but if I assume that they have entered into a
17 conspiracy, then he is liable for the acts and statements of
18 his co-defendant to the degree that they are in furtherance of
19 the conspiracy and during the time period in which the
20 conspiracy is alleged to have taken place. He might even be
21 responsible for ones before that.

22 But the short of it is that, if your co-conspirator
23 talks a lot and says something about you, that can be
24 introduced as to you. Now, you may get up and say or you may
25 ask for a limiting instruction saying there is no evidence that

1 this took place, this is simply David saying it, but to the
2 degree that the conspiracy is one to extort through the use of
3 fear, then the statements, any of the statements of either of
4 the co-conspirators are admissible for that purpose, whether or
5 not -- if you want me to say to the jury or you are going to
6 develop it in some fashion there is no evidence that this took
7 place, it is admitted solely for the purpose of whether or not
8 in the Government's contention that it induced fear in the
9 victim.

10 MR. TUMPOSKY: And there's also no evidence that James
11 intended for this information to be communicated, and that's
12 the issue that I have.

13 THE COURT: I don't think that you have to have
14 approval by one co-conspirator of whatever another
15 co-conspirator could foreseeably say. If there was some
16 evidence that, "Don't tell him about the guy I shot in
17 Georgia," that is a different issue.

18 MR. TUMPOSKY: I guess I don't want to sort of
19 conflate the hearsay and the relevance issue. I agree that
20 under the hearsay analysis, if there is a proof of a conspiracy
21 and it's in furtherance, then it's not hearsay. What I am
22 saying is, in order to establish relevance, the Government has
23 to show James was aware these threats were going to be
24 communicated.

25 THE COURT: I don't think that's right, at least as

1 you have explained it. I think what is critically important or
2 a necessary precondition is that it is in furtherance of the
3 conspiracy, and in furtherance here is the attempt to induce
4 fear in the victim that violence will be used to achieve the
5 economic interests that the defendants are trying to achieve.

6 MR. TUMPOSKY: Well, if I may try and flesh that out
7 in the next day or two, your Honor --

8 THE COURT: I will hear you on that. I assume that
9 this aspect of it is not going to be in opening statement, or
10 is it, that is, David said, "James shot somebody in Georgia"?

11 MS. KAPLAN: No, no.

12 THE COURT: Okay. I will fine-tune it, but the broad
13 outline of this is, I think, fairly clear. Also, because I
14 date myself by saying this, and that I do not want to show a
15 pride of authorship, but I wrote extensively, I think it was in
16 1987, a case called United States v. Dray in which I talk about
17 the ways in which co-conspirator hearsay comes in and the
18 circumstances in which it comes in.

19 MR. TUMPOSKY: Versus?

20 THE COURT: Dray.

21 MR. TUMPOSKY: D-r-e?

22 THE COURT: D-r-a-y, and it was just at the time that
23 Bourjaily was coming down. But that was my kind of outline of
24 it, and it has been, from my perspective, serviceable since
25 then, and you will want to take a look at it to see, or you may

1 want to take a look at it and see how I approach these issues.

2 MR. CRUZ: Your Honor, again at the risk of beating a
3 dead horse, I just want to point one issue out to the Court
4 with regard to the Kristina Ursova matter. My understanding
5 from the review of the discovery, and I don't think the
6 Government will disagree, is that there was a threat, quote,
7 unquote, or threats made by both David and James at an earlier
8 date than when this transcript or this recording was done, the
9 one that we're focusing on today. That interaction was not
10 recorded. So, any evidence regarding that situation will be
11 through testimony of Victor Torosyan. So, on November 9th, I
12 believe, of 2015, that's when the threats, quote, unquote, are
13 made to him with regard to --

14 THE COURT: These are the unrecorded threats?

15 MR. CRUZ: These are the unrecorded threats. But this
16 is the crux of the case for the Government, which is, "They
17 asked me to divvy up my interest in the business and give it to
18 various people, and they threatened to do various things to me
19 if I didn't." It's not clear whether Mr. Torosyan knew about
20 the Kirstina Ursova situation at that point.

21 And I highlight the difference only because in this
22 transcript that is being introduced there's no request on the
23 part of David from Victor to give up his interest. Arguably,
24 there's no threat made to him directly to give up his interest.
25 So, I think it's critical to the question of Mr. Torosyan's

1 knowledge.

2 THE COURT: You can argue that to the jury, but it is
3 evidence, and we are talking about the duration of the
4 conspiracy, and if during the duration of the conspiracy
5 Mr. Torosyan was aware of the potential for violence that David
6 presented, the Government contends, then it comes in, and you
7 can say, "They didn't record or there wasn't recorded this
8 initial encounter between them, so we don't even know what was
9 said. Now let's focus on the rest of it. He wasn't asking him
10 for anything in the recorded translations." I'm not telling
11 you how your argument is going to go, but I am trying to
12 outline the fact that you can make that argument, but the
13 evidence is in there, I think. Now, you are going to have to
14 deal with the evidence there. It is not going to get excluded
15 on the idea that he didn't say it both times.

16 MR. CRUZ: Right. But I just wanted to highlight the
17 chronology and that it's not clear whether he knew about
18 Kirstina Ursova and that incident at the time --

19 THE COURT: Right, and that's not critical to my
20 determination with respect to the admissibility, given that he
21 was aware at a time during the course of the conspiracy. Okay?
22 Anything else that we need to take up on that?

23 So, what I have done with respect to the motion *in*
24 *limine* under 404(b), prior acts, that is Number 75, is we have
25 had a discussion. The Government has indicated that it will

1 introduce evidence with respect to the Davis matter to show
2 relationships among witnesses and perhaps to show motive in the
3 sense of some of the witnesses may have been asking for money,
4 and David and James were looking for ways to fund their
5 response. But beyond that none, unless somebody approaches me
6 at the sidebar. So, it is allowed to that extent.

7 With respect to the, permit me to say, late-filed
8 motion *in limine*, I am prepared to exclude that portion that we
9 discussed earlier on, and the Government has agreed to that. I
10 am not prepared to exclude the portion that deals with the
11 encounter of whatever dimension between David and Kirstina.

12 MR. CRUZ: That's fine, your Honor. Note my
13 objection.

14 THE COURT: Okay. Anything else that we need to talk
15 about before trial?

16 MS. KAPLAN: I have a question for you, your Honor,
17 since I haven't tried a case here.

18 THE COURT: Sure.

19 MS. KAPLAN: So, the defendants have agreed to many of
20 the Government's exhibits, which are now just trial exhibits.
21 Do you want me to still go through the foundational questions
22 with witnesses?

23 THE COURT: Not so much foundational, but I want the
24 jury to be aware and the record to reflect that a document or a
25 something has been introduced, and so language along the lines

1 of, "I now offer Exhibit 5, a letter, which is not, as I
2 understand it, your Honor, objected to," and then I will allow
3 it. But the record will reflect it and the jury will be
4 alerted to the idea that a document has been introduced or a
5 something has been introduced.

6 MR. TUMPOSKY: The only other issue, if we are going
7 to go through --

8 THE COURT: Does that fully answer the question for
9 you?

10 MS. KAPLAN: Yes.

11 THE COURT: What I am basically saying is you don't
12 start the trial by saying, "I offer all of the things that
13 aren't objectionable."

14 MS. KAPLAN: No, no. And I'm going to ask the
15 witnesses to talk about all of these documents, anyway. I just
16 wanted to know if you wanted me to go through, "Are those a
17 fair and accurate representation?"

18 THE COURT: Unless there is some -- the jury may look
19 at it and say, "This doesn't look like a fair and accurate
20 representation."

21 MS. KAPLAN: Right.

22 THE COURT: I don't think they are going to. But the
23 shorthand, the direct route as opposed to the scenic route of
24 introducing it is simply to say, "Here is Document Number 1. I
25 don't believe it is objected to. I offer it." And I would

1 say, "Admitted."

2 MR. TUMPOSKY: The only other issue is some of the
3 exhibits that are contested. I don't know if now is the time
4 that we're going to address that, or do we do that the first
5 day?

6 THE COURT: I'm happy to do it, if I can do it now or
7 shortly with a full understanding of it. What are we talking
8 about? Just give me categories.

9 MR. TUMPOSKY: Well, I know, personally, for my case I
10 have maybe three exhibits that I want to put in, and one of
11 them I know --

12 THE COURT: These are ones you want to put in that you
13 are concerned about the Government --

14 MR. TUMPOSKY: They have indicated on two of them that
15 they are going to object.

16 THE COURT: So, what are we talking about?

17 MR. TUMPOSKY: Well, one, and I'm not sure exactly
18 what I will do in the end on this, but there actually was a
19 recording involving Torosyan and James. The Government has
20 indicated it does not intend to put it in. I may --

21 THE COURT: Where did it take place? What is its
22 provenance?

23 MR. TUMPOSKY: The idea was that Victor would get a
24 recording of James making threats. That was a notion that took
25 place, I believe, at the clinic, is where the recording was.

1 THE COURT: So, the thrust of your presentation would
2 be, "Even when he was trying to develop threats he couldn't do
3 it. Here is a tape?"

4 MR. TUMPOSKY: That's essentially right, your Honor.

5 THE COURT: What's the problem with that?

6 MS. KAPLAN: It's inadmissible hearsay, your Honor.
7 It's not a statement against a party opponent. It's a
8 self-serving statement by a defendant.

9 THE COURT: I think it may be, I think it may be
10 offered fairly against the Government, and it may be offered
11 for a non-hearsay purpose, that is, true or not, here is what
12 he said, and if it is a "Kum ba yah" moment, it is inconsistent
13 with the tape that is being offered. We will talk about it
14 some more, but you are entitled to my kind of understanding of
15 things.

16 MS. KAPLAN: Well, I would like an opportunity to
17 brief it as well.

18 THE COURT: Sure. That's fine. The first question I
19 ask is, is this opening statement material? Because that means
20 I have to deal with it quickly rather than --

21 MR. TUMPOSKY: I would like to at least discuss it
22 generally during my opening, because I think it's very
23 important, not the words, necessarily, but that there was a
24 conversation, it was monitored.

25 THE COURT: If there is a question about the

1 admissibility of a piece of evidence that I can give the
2 parties a heads-up about and they want to use it in opening
3 statement, I want to be able to deal with it. If it's done in
4 a general sort of way, "Ladies and gentlemen, they had a number
5 of interactions, and these were not threatening interactions.
6 You will hear one of the tapes," it's a kind of general
7 discussion not directed at all of this, that's fine. Then we
8 don't have to deal with that up front. If, by contrast, you
9 say, "And you are going to hear another tape, not just the tape
10 the Government has, but you are going to hear another tape, and
11 that other tape will make clear that they were best buddies,"
12 or whatever it makes clear.

13 MR. TUMPOSKY: I would like the liberty to develop
14 that.

15 THE COURT: So, Ms. Kaplan, you will look at it, and I
16 think we will take it up on Monday morning --

17 MR. TUMPOSKY: Sure.

18 THE COURT: -- the question, that that is just a small
19 portion of whatever your opening statement is. Okay. What
20 else?

21 MS. KAPLAN: Well, I just ask for leave to file
22 something.

23 THE COURT: Yes. I am not saying by 1:30 today. Get
24 me something no later than, let's say, noon on Sunday.

25 MS. KAPLAN: I can do that, your Honor.

1 MR. TUMPOSKY: The other exhibit that I know is
2 contested, there was a civil case that was sort of going on at
3 the same time that a lot of this other evidence was being
4 developed.

5 THE COURT: What was civil case?

6 MR. TUMPOSKY: It was a suit that the brothers filed
7 against Victor when he essentially ejected him from the
8 business using his supposed contractual authority. A judge in
9 the Superior Court essentially froze that ejection, that
10 expulsion and held it pending a full trial on the merits,
11 essentially. So, what I want to do is actually introduce --

12 THE COURT: What is the state of that litigation now?
13 Is it stayed?

14 MR. TUMPOSKY: It's frozen. It's stayed, yes.

15 THE COURT: "Frozen" is a much more vivid way of
16 describing it, but I understand the word "stayed."

17 MR. TUMPOSKY: It is stayed, your Honor. So, the
18 judge wrote a decision, essentially, and there is a piece of it
19 which says, "Well, this action where Victor Torosyan
20 unilaterally expelled the defendants from the business, I'm
21 issuing an injunction against that. That's not going to take
22 effect. We're going to hold that until the civil case goes
23 through a full trial." And I want to put that piece of the
24 judge's decision in, because I think it's relevant to --

25 THE COURT: You are not going to get the judge's

1 decision in, unless it deals with an act that is material to
2 this case. Let me just outline again, so you can refine your
3 response to whatever I am going to say.

4 MR. TUMPOSKY: Sure.

5 THE COURT: The fact of the litigation can come in and
6 the fact that they contested his position can come in, but
7 interlocutory decrees by another Court and its memoranda do not
8 come in.

9 MR. TUMPOSKY: And I'm not putting it in to show that
10 there's some sort of legal imprimatur on any particular
11 conduct. I want it in to show Victor's state of mind; in other
12 words, he read that decision and he knows that he needs to
13 prevail essentially in some way against the defendants.

14 THE COURT: You can raise the issue without enlisting
15 the support of a Superior Court Judge as a non-appearing
16 witness in this case to speak to the question of likelihood of
17 success on the merits. No. But you can ask him --

18 MR. TUMPOSKY: "You got a decision -- "

19 THE COURT: No, no.

20 MR. TUMPOSKY: How would I phrase it, your Honor?

21 THE COURT: "You are in litigation with him. You are
22 trying to prevail on that litigation. It became very
23 important, it's important to you to prevail in this case, isn't
24 it? This is really why you went to the Government, isn't it?
25 You found yourself in a position in which you were going to be

1 in a business dispute, and you have decided that you would
2 enlist the FBI in dealing with it." That is fair enough. But
3 not whoever the judge is, not Judge Wilkins, not whoever. They
4 do not get in.

5 MR. TUMPOSKY: Well, what if I just say, "You knew
6 that the issue of expulsion would not be resolved until the end
7 of the civil trial"?

8 THE COURT: Well, I guess that's right. I mean, I
9 don't see that as a problem.

10 MR. TUMPOSKY: Without mentioning because a judge
11 ordered it.

12 THE COURT: Right, that this was an open question that
13 was going to be litigated in the case.

14 Any objection to that, Ms. Kaplan?

15 MS. KAPLAN: No. I don't know exactly what we are
16 talking about here, and just so your Honor is aware, the victim
17 had gone to the FBI before any legal action.

18 THE COURT: Okay. But right now here in court or
19 Monday here in court, wherever he shows up, he is going to be
20 somebody who has got an axe to grind, big surprise, a witness
21 with an axe to grind, and he is going to come in and say -- and
22 he is going to be confronted by saying, "What is really
23 animating you here is you want to get a business advantage,
24 and, in fact, you are in litigation with these guys, aren't
25 you?" Guys or guy.

1 MR. TUMPOSKY: Yes.

2 THE COURT: So, that will be permitted.

3 MR. CRUZ: Just to follow up on that, your Honor --

4 THE COURT: Sure.

5 MR. CRUZ: -- there will be evidence coming in that
6 Mr. Torosyan did exercise his authority under the Operating
7 Agreement to eliminate their interests. Without getting into
8 whether a judge contradicted or vetoed that exercise, would it
9 be --

10 THE COURT: "Froze" I think is the term of art.

11 MR. CRUZ: -- right. Would it be appropriate for us
12 to say that their interests are still valid without --

13 THE COURT: No. The validity of the interests is not
14 material to this case and even relevant in this case unless you
15 are saying he had no interest so there could not be a threat of
16 economic harm, and that seems not likely. The extent of it is
17 to say that there is dispute among these parties about various
18 aspects of this, but it seems to me that conspiring to engage
19 in the use or threat of use of force, physical violence,
20 survives ongoing disputes about whose economic interests will,
21 in fact, ultimately prevail.

22 MR. CRUZ: All right.

23 THE COURT: Was there an opinion?

24 MR. TUMPOSKY: I'm sorry?

25 THE COURT: Was there an opinion? Was there something

1 written?

2 MR. TUMPOSKY: Yes.

3 MR. CRUZ: Yes, there was, your Honor.

4 THE COURT: I don't think I have it, or maybe I do.

5 Do I?

6 MR. CRUZ: You don't, because we will be releasing a
7 copy of all of the exhibits, the list, and we can provide it to
8 the Court.

9 THE COURT: Why don't you give me a sneak preview of
10 it. I would like to look at it, just so I am more fully aware
11 of what is going on.

12 MR. TUMPOSKY: Sure.

13 MR. CRUZ: And one last question, your Honor. Back to
14 the issue of the transcripts that are being admitted, and maybe
15 this isn't a fair question at this point because we haven't
16 started the trial, but I am concerned with the back and forth
17 that is certain to take place with regard to the transcripts,
18 which is, certain portions of the transcript are going to be
19 highlighted by the Government. Obviously, they're going to
20 argue that these were threatening, these comments were
21 threatening to Mr. Torosyan. We will be able to respond to
22 that, but I guess my question is to the Court how much leeway
23 will the Court give the Government to flesh out further what
24 these individual comments are all about or elicit new
25 information that may be hearsay, may not be?

1 THE COURT: Well, I don't know about that, but let me
2 tell you how ordinarily I deal with foreign-language
3 transcripts or conversations. I will permit a narrative. That
4 is, the Government can ask Mr. Torosyan, "Did you have a
5 conversation? What was said in the conversation in a general
6 sort of way? What was said back and forth?" Then, "Was it
7 recorded?" "Yes." Offer the transcript. "This is the
8 transcript." The jury will get to listen to the foreign
9 language because, as difficult as this is, the forcefulness of
10 presentation is something that is appropriate, and they will
11 walk through the transcript itself -- not walk through it --
12 simply follow along with the transcript itself. I don't know
13 what kind of software the Government is using, whether or not
14 it is going to be able to identify, "We are at this point in
15 the transcript when you are hearing that."

16 Ms. Kaplan?

17 MS. KAPLAN: Well, what I was intending to do, your
18 Honor, is because these are in Russian, I was not going to play
19 the calls with the exception of one part of it. There's also
20 video. So, just one part, just so they are able to hear the
21 forcefulness of the conversation and see the defendant. What I
22 was going to do is put them in through Mr. Torosyan and to read
23 with Mr. Torosyan certain portions, because, although there are
24 only two transcripts that I plan on using, they are very long,
25 and they go back and forth, and I think it will bore the jury

1 to tears. So, the pages have been numbered, and I was going to
2 direct him to certain pages and lines and read with him and
3 just -- you know, sometimes I will ask him, "What was your
4 understanding of what the defendant said?"

5 THE COURT: So, I'm not going to foreclose that. I do
6 not want an extended transcript. I once had a case in which I
7 was involved and Judge Garrity was involved in which the
8 cooperating witness was particularly instructed not to turn on
9 the tape recorder when he left his house in Gloucester on his
10 trip to Danvers, and he did, and so the jury, because there was
11 no objection, the jury got to listen to the type of music that
12 he was interested in from Gloucester to Danvers. Judge Garrity
13 was more indulgent than I would be under those circumstances.
14 So, if they are going to focus on something, I will permit them
15 to focus on portions of it, and you can develop the larger
16 portion.

17 MR. CRUZ: Sure.

18 THE COURT: But I do not want this to be a movie about
19 sleep that shows someone sleeping for 12 hours. It has got to
20 be focused on what is important.

21 MR. CRUZ: I understand that, your Honor. And I guess
22 what I want to avoid, I understand what the Court is saying in
23 a situation where a particular excerpt of the transcript is
24 brought up, let's talk about the Kirstina Ursova situation, and
25 the FBI has had and Ms. Kaplan has had ample opportunity to

1 question Mr. Torosyan about that situation and she asks him,
2 "Well, how did that make you feel?" And, in addition to
3 reiterating what was stated, he adds to that, "Well, I know
4 that he hit three other people, too." That sort of thing is --

5 THE COURT: Well, I hope that Mr. Torosyan does not do
6 that, because I will have to instruct him in the presence of
7 the jury about the limitations of what he has to do, and I'm
8 sure Ms. Kaplan will alert him to his obligations and will be
9 alert to the effect of such an instruction in the presence of
10 the jury to the principal witness.

11 MR. CRUZ: Thank you.

12 THE COURT: The Government is going to get to explore
13 with direct testimony that he had a conversation, that kind of
14 thing, in a general sort of way. It cannot go on forever.
15 Then, "Now I would like to direct you specifically -- this was
16 recorded, right," or however you do it, but, "This was
17 recorded, right?" "Yup, it was." "Here's a transcript. Is
18 this a fair and accurate transcript?" "Yes, it is." "Now I
19 want to direct you to Page 7. Here is this communication."

20

21 By the way, if there is some question about what the
22 words are, you can ask that. And you can ask the Oprah
23 question, maybe it won't be put as a an Oprah kind of question,
24 "How did that make you feel?" But it is relevant to the
25 question of how the defendants understood their impact to be

1 upon the individual. All right?

2 MR. CRUZ: Yes.

3 THE COURT: So, that is how I will deal with it, and
4 if somebody wants to play more, not the music from Gloucester
5 to Danvers, but wants to play some more, you can.

6 I want to go back to this question of jury
7 instructions, because I am thinking about it. That seems to
8 me, that is, who is it that we are concerned about here seems
9 to me to be the real kind of legal instructional issue. Is
10 there any dispute that it is in the context of conspiracy the
11 understanding of the defendant that I am instructing the jury
12 about? Putative understanding of the cooperating witness may
13 be evidentiary of the understanding of the defendant, but I am
14 not instructing the jury, because it is not a substantive
15 violation, about you had looked to the understanding of the
16 victim here. I have just outlined it broadly. You may want to
17 think about it.

18 Obviously, you would want to think about it, Ms.
19 Kaplan, some more, but that is on my mind now. It will not be
20 resolved until I instruct the jury. It is whatever I instruct
21 the jury. But that is the one that stuck out at me. I do not
22 see much else here that is beyond garden-variety Hobbs Act
23 stuff, but maybe you --

24 MR. TUMPOSKY: Well, there are some discrepancies
25 between the significant --

1 THE COURT: Okay. And neither one of you are going to
2 get the language you want. It will be my language. I just
3 want to know conceptually whether or not there are some things
4 that you think I ought to be looking at.

5 MR. TUMPOSKY: There are a couple of things, your
6 Honor.

7 THE COURT: Then, what I would ask you to do is just
8 file something that just says with particular reference, "The
9 Court may wish to consider these," just so I am kind of up to
10 speed on that issue. But I have outlined the question of, call
11 it "scienter," that I think is critical here, and it is
12 scienter of the defendants and not of the victim. The victim
13 becomes subordinate to the scienter of the defendants. Maybe I
14 have got that wrong. If I do, then I will stand instructed,
15 but think about instructing me on that. Okay?

16 MS. KAPLAN: Yes, your Honor.

17 THE COURT: Anything else?

18 MR. CRUZ: No, your Honor.

19 MS. KAPLAN: No, your Honor.

20 THE COURT: Okay. So, I will be receiving some
21 further filings from the parties to shape it, but we will be
22 off and running on Monday morning. Okay?

23 MS. KAPLAN: Thank you.

24 THE COURT: Thank you. And this is Ms. Kaplan's. I
25 am passing it back.

1 MS. KAPLAN: Thank you, your Honor.

2 THE CLERK: All rise.

3 (The Honorable Court exited the courtroom at 12:38 p.m.)

4 (WHEREUPON, the proceedings adjourned at 12:38 p.m.)

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